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DECISION



20282

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-202508.2

DATE: December 15, 1981

MATTER OF: Skillens Enterprises

DIGEST:

1. Where contracting agency determined that small business concern lacked certain elements of responsibility relating to bidder's technical capability and past performance and, upon referral to Small Business Administration (SBA) for Certificate of Competency (COC), SBA's independent review disclosed additional areas of concern regarding bidder's financial capacity, SBA's denial of a COC based upon all factors in record is unobjectionable. Protester's argument that 13 C.F.R. § 125.5 (a) (1981) restricts SBA's right of review to those elements referred by the contracting agency is not persuasive since it would result in SBA's having to issue a COC to a firm which it believes cannot perform the contract, a result inconsistent with the intended purpose of the COC program.
2. While GAO will generally not review SBA decision to issue a COC absent a prima facie showing of fraud or that information vital to responsibility determination was wilfully disregarded, GAO will consider protest that SBA has disregarded its published regulations concerning its right to review elements of responsibility other than those referred to SBA by procuring agency. However, general rule applies to protest against SBA judgmental determination that protester lacked elements of responsibility relating to quality control and other issues referred to SBA by contracting agency.

Skillens Enterprises protests the Small Business Administration's (SBA) denial of a Certificate of Competency (COC) in connection with Skillens' bid submitted under IFB No. F08650-81-B-0040 issued by the

Eastern Space and Missile Center, Patrick Air Force Base, Florida. Skillens contends that SBA improperly considered its financial condition in denying its application for a COC. We believe the SBA acted properly and deny the protest.

The subject solicitation, a small business set-aside, sought custodial and "clean room" services for approximately 200 buildings at the Cape Canaveral complex. This work involved both routine janitorial services and the specialized cleaning of high bay air locks, calibration laboratories, and similar sensitive areas. Skillens submitted the lowest responsive bid received by the Air Force.

The contracting officer, based on a preaward survey by the Defense Contract Administration Services (DCAS) which concluded that Skillens' technical capability, quality assurance capability and performance record were unsatisfactory, determined Skillens to be nonresponsive. The matter was then submitted to SBA for possible issuance of a COC in accordance with 15 U.S.C. § 637(b)(7) (Supp. III 1979) and 13 C.F.R. § 125.5 (1981). As part of this review process, SBA's industrial specialist conducted another on-site survey of Skillens' facilities. This independent survey confirmed that Skillens did not possess the necessary skills in the areas noted by DCAS.

This report was then considered by an SBA Region VII Review Committee which concurred with the SBA independent survey and unanimously recommended that the COC be declined. Although the Review Committee noted that the COC referral was based solely on Skillens' capability to perform, it considered a complete financial analysis of Skillens because the proposed contract was for an amount over \$250,000. The Review Committee concluded that Skillens did not have adequate credit to perform the contract and that the firm was in fact insolvent.

Consequently, by letter dated May 29, SBA informed Skillens that its application for a COC had been denied. The letter stated:

"We have carefully reviewed all information and data supplied and find no sufficient reason for disagreeing with the decision of the procuring agency.

The COC Review Committee was in unanimous agreement that serious production, quality, and financial difficulties would accrue to you should you be awarded the contract."

The letter went on to list three of the areas where difficulties could be expected; production, quality control and financial. Under production, the letter explained that Skillens would run into financial trouble because of the successor clause of an existing union contract at the facility. The letter further explained that Skillens did not have the experience to meet the exacting quality assurance procedures incorporated into the solicitation and contained a detailed explanation of the SBA's views on Skillens' lack of financial resources.

Skillens contends that the reasons given by the SBA for declining to issue a COC "boil down to finances" and that SBA's failure to issue a COC on this basis was improper because the Air Force had not questioned Skillens' financial capacity and SBA regulations at 13 C.F.R. § 125.5(a) limit SBA's consideration in a COC proceeding to the specific elements of responsibility referred to it by the contracting agency.

We do not generally review matters involving SBA decisions to issue or not to issue a COC since by statute SBA has conclusive authority to rule on the responsibility of a small business bidder. 15 U.S.C. § 637(b)(7). We will do so, however, where a protester presents a prima facie showing of fraud or bad faith or where information vital to the responsibility determination has not been considered. JBS Construction Company, B-187574, January 31, 1977, 77-1 CPD 79. We also think it is appropriate to consider COC situations in which it appears that SBA may not have followed its own published regulations, just as we consider SBA's alleged failure to follow its regulations involving the section 8(a) program. See, e.g., Orincon Corporation, 58 Comp. Gen. 565 (1979), 79-2 CPD 39. Consequently, we will consider this protest.

13 C.F.R. § 125.5(a) states the following:

"Government procurement officers and officers engaged in the sale and disposal of Federal property, upon determining and documenting that a small business lacks certain elements of responsibility, including but not limited to competency, capability, capacity, credit, integrity,

perseverance, and tenacity, notify SBA of such determination. Award is withheld * * * in order to permit SBA to investigate the elements referred and certify as to the bidder's responsibility with respect to the elements referred."

The protester emphasizes the words "elements referred" in support of its position that SBA may not consider any aspect of responsibility other than what is specifically referred by the procuring activity. SBA, on the other hand, states that the regulation was not intended to so limit its COC review process and that to interpret it as the protester does would result in SBA's having to issue a COC to a firm which it believes cannot perform the contract.

We agree with SBA. We previously have recognized that "the COC procedure is not limited to a consideration of the deficiencies found by the contracting officer * * * [and] that SBA may refuse to issue a COC for a reason different from the contracting officer's determination of nonresponsibility." ALS Electronics Corp., B-179033, February 22, 1974, 74-1 CPD 92. While the current language of 13 C.F.R. § 125.5(a) was not in SBA's regulations at that time, section 125.5(a) does not purport to limit what SBA can do when a COC referral is made. Rather, the section merely recites what normally happens when a small business bidder is found not to be responsible by a contracting officer. Such a recitation does not automatically impose legal limitations such as the protester suggests, and SBA's continuing practice strongly suggests that its adoption of the current regulatory language was not intended to curtail what it could do in a COC procedure.

Moreover, to read the regulation as the protester does would subvert the COC process because it would require SBA, after it concluded that a bidder is wanting in one area encompassed by a responsibility determination, to certify the bidder as responsible simply because the procuring agency didn't also specify that area as a reason for referral. We do not believe that SBA reasonably could have intended such a result. Finally, it is a well-settled legal axiom that an agency's interpretation of its own regulation "must be accorded the greatest deference," even where the agency interpretation "is merely one of several reasonable alternatives." Allen W. Campbell Co. v. Lloyd Wood Construction Co., 446 F.2d 261, 265 (5th Cir. 1971).

In any event, we do not think the record supports Skillens' conclusion that SBA denied Skillens a COC solely because of its financial condition. It is clear from the report of the SBA investigator, the record of the SBA Review Committee meeting and, most significantly, from the May 29 notice, which states that the SBA could "find no sufficient reason for disagreeing with the decision of the procuring agency,"¹ that the SBA's decision was based, in large part, on the elements raised by the DCAS report and adopted by the procuring agency.

The protester bases its position that Skillens' financial condition caused SBA to reject its COC application to a great degree on the three elements specifically listed in the May 29 notice letter. It does not appear from that notice letter, however, that these three elements were intended to be a complete list of SBA's reasons for rejecting Skillens' COC application. They are referred to in the notice as "some of the specific areas of almost certain difficulties * * *." One of the elements, quality control, of course, appears to have little direct relation with finances. Skillens dismisses concern with quality control as a "nullity" because it views SBA's conclusion in this regard as clearly erroneous. This is a judgmental matter for SBA, however, and absent evidence of bad faith, we cannot take exception to the conclusion. See Dan's Janitorial Service & Supply, B-200360, January 22, 1981, 81-1 CPD 36. In short, we find it clear that more than financial considerations played a part in SBA's decision to deny a COC.

The protest is denied.

Milton J. Jordan
for Comptroller General
of the United States

¹ The record shows and, in fact, the protester admits in its June 12 submission that the agency's non-responsibility determination was "[b]ased solely upon the preaward survey conducted by the Defense Contract Administration Services * * *."

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